

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PORT OF SEATTLE,

Plaintiff,

v.

THE BOEING COMPANY,

Defendant.

No.

COMPLAINT FOR DAMAGES AND
DECLARATORY RELIEF

Plaintiff Port of Seattle (“Port”), for its Complaint against Defendant The Boeing Company (“Boeing”), alleges and states as follows:

I. INTRODUCTION

1. This is a civil action for cost recovery and declaratory judgment under sections 107(a) and 113(g)(2) of the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9607(a) and 9613(g)(2), and for contribution and declaratory relief for the recovery of remedial action costs under Washington’s Model Toxics Control Act (“MTCA”), Wash. Rev. Code Ann. §§ 70A.305.040 and 70A.305.080, relating to CERCLA response costs and MTCA remedial action costs associated with the Lower Duwamish Waterway (“LDW” or “Waterway”) Superfund Site (“Site”) in King County, Washington.

COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF - 1

1 2. At the start of the 20th century, the Duwamish River meandered naturally among the mud
2 flats south of the City of Seattle before emptying into Elliott Bay. In the second decade of the
3 century, in accordance with the will of the Washington legislature and King County, the lower
4 few miles of the winding Duwamish River were transformed (through substantial dredging and
5 filling) into a straightened commercial waterway whose center channel the U.S. Army Corps of
6 Engineers (“Army Corps”) would repeatedly dredge in the decades to follow, to allow vessel
7 navigation within the LDW to support the growth of industry and commerce.
8

9 3. Industry and commerce flourished throughout the 20th century along the LDW, with
10 scores of industrial operators conducting activities including shipbuilding, shipyard maintenance,
11 metal forging and fabrication, wood chemical treatment operations, and a wide variety of
12 manufacturing operations including chemical, cement, and aircraft manufacturing.
13

14 4. Although a wide variety of manufacturers came and went over the decades along the
15 LDW, one industrial manufacturer – which has operated along the Waterway from 1917 to the
16 present – dwarfs all others in terms of the scope, intensity, and longevity of its operations along
17 the LDW: Boeing.
18

The Boeing Company

19 5. For over 100 years at 10 major facilities along the LDW, Boeing manufactured tens of
20 thousands of commercial and military aircraft, missiles, and spacecraft, and conducted a wide
21 variety of supporting operations (e.g., testing and salvage activities) that together generated
22 extremely large quantities of toxic industrial waste. Boeing has also owned or operated 23 other
23 facilities in the vicinity of the LDW, including an industrial park and warehouses.
24
25
26

1 6. Boeing's facilities along and near the LDW ("Boeing LDW Facilities") have occupied
2 nearly 300 acres along or draining to the Waterway, including nearly 600 buildings, 100 outfalls,
3 over 100 polychlorinated biphenyl ("PCB") transformers, over 1,000 PCB capacitors, and more
4 than 60 linear miles of rain-exposed PCB-contaminated caulking.

5 7. Throughout the last century of industrial operations along the LDW, one facility stands
6 out as the single largest source *by far* of PCBs released to the Waterway: Boeing Plant 2. Boeing
7 conducted high-intensity aircraft manufacturing operations at Plant 2, which, for years at a time,
8 operated 24 hours per day and produced roughly 10,000 military aircraft in just the time period
9 of 1942-1945. During those years, Boeing Plant 2 produced hundreds of bombers every month
10 in dozens of buildings covering millions of square feet of floor space, making Plant 2 one of the
11 most heavily and intensely operated aircraft manufacturing plants in the country.
12

13 8. Plant 2 continued to serve as Boeing's primary aircraft manufacturing center for decades
14 following World War II. All aspects of aircraft manufacturing took place at Plant 2, including
15 fabrication of airplane parts, chemical milling, chemical conversion coating, tool-making,
16 painting and paint stripping, metal finishing, heat treating, sheet metal forming, testing, and
17 anodizing and electroplating, as well as storing and disposing of hazardous wastes.
18

19 9. For decades, Boeing pumped PCBs from numerous transformer vaults (holding leaking
20 transformers) at its Plant 2 facility directly to the LDW, with concentrations (as late as the
21 1990s) of up to 1 billion parts per billion ("ppb") – i.e., 100 percent PCB – detected in vault
22 sludge, 460 million ppb (46 percent PCB) in the piping leading from the vault to the LDW, and
23 890,000 ppb in sediments near the base of the associated outfall. To put those concentrations in
24 context, the sediment PCB cleanup level in the United States Environmental Protection Agency's
25
26

COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF - 3

1 (“EPA”) cleanup plan for the LDW is just 2 *ppb*. Further, the 890,000 ppb concentration in
2 subsurface sediment is consistent with PCBs being released from Boeing Plant 2 over a long
3 period of time.

4 10. Boeing’s PCB sediment contamination footprint is far from limited to just the one hot
5 spot described above. The sediments adjacent to the nearly one-mile length of Boeing Plant 2
6 were saturated with extremely high concentrations of PCBs, both in surface (top 10 cm) and
7 subsurface sediments. Obvious PCB hot spots are also well documented immediately adjacent to
8 outfalls draining other Boeing LDW Facilities, such as the Boeing Developmental Center,
9 Military Flight Center, and North Boeing Field.

11 11. Boeing has also released large magnitudes of other hazardous substances to the LDW,
12 including dioxins/furans, polycyclic aromatic hydrocarbons (“PAHs”), phthalates, arsenic, and
13 other metals.

15 12. In 1950, *Boeing Magazine* (an internal company publication) candidly acknowledged,
16 “The Duwamish . . . is the natural collector for Boeing’s fluid wastes; indeed, any unrestrained
17 liquid emptied on the Boeing premises is bound sooner or later to get into the Duwamish.”

18 13. Based on all LDW sampling, analysis, and remedy planning to date, PCBs are anticipated
19 to be *by far* the biggest remedy cost driver among LDW contaminants in EPA’s selected remedy
20 for the Site. Data show that the greatest number of LDW sediment remedial action level
21 (“RAL”) exceedances, which trigger the requirement of dredging or other costly remediation, are
22 from PCBs. In terms of the volume of sediments that will need to be dredged or otherwise
23 actively remediated, PCBs are by far the predominant contaminant driving the need for that
24 costly remediation.
25
26

1 14. Boeing has released PCBs to the LDW in a magnitude (i.e., reflecting volumes and PCB
2 concentrations of released materials) that far exceeds that of any other industrial operator (or
3 indeed, nearly all other industrial operators put together).

4 15. Crucial for the LDW and its cleanup, the PCBs released from Boeing LDW Facilities
5 over the course of several decades have not remained confined to the immediate vicinity of those
6 facilities. To the contrary, the natural dynamism of the LDW (including daily tidal influences
7 and periodic high-volume flows from upstream) has dispersed Boeing-contaminated sediments
8 widely within the LDW through initial sediment transport and deposition at the time of discharge
9 from Boeing LDW Facilities, as well as through ongoing resuspension and redistribution of
10 sediments previously contaminated by earlier Boeing releases.

11 16. The fact of Boeing's high-concentration PCB contamination being widely dispersed
12 throughout the LDW, combined with EPA's very low concentration thresholds for requiring
13 dredging or other active remediation (i.e., 130 to 240 ppb), means that Boeing is by far the
14 greatest cause of LDW PCB contamination, and that PCB contamination is by far the biggest
15 driver of LDW cleanup costs, which are anticipated to be as much as \$1 billion if not more.

16
17
18 **The Lower Duwamish Waterway Group**

19 17. In 2000, Boeing, the Port, the City of Seattle (the "City"), and King County (the
20 "County") formed the Lower Duwamish Waterway Group ("LDWG") and entered into an
21 Administrative Order on Consent with the EPA and the Washington Department of Ecology
22 ("Ecology"). That order required the LDWG parties to conduct a remedial investigation and
23 feasibility study pursuant to both CERCLA and MTCA to investigate the nature and extent of
24 LDW contamination and develop remedial alternatives for the LDW sediment Site.
25
26

1 18. The Port joined LDWG in 2000 as an act of responsible public stewardship and as part of
2 a plan to work proactively with EPA to achieve an efficient and reasonable LDW cleanup. At
3 that time, the Port and the other LDWG parties anticipated that the remedial investigation and
4 feasibility study would take no more than a few years. Relying on that time frame, the Port
5 agreed to share costs of the remedial investigation and feasibility study with Boeing, the City,
6 and the County equally – 25 percent per party – as an interim arrangement pending reallocation
7 of those costs based on equitable factors regarding responsibility for the contamination at issue.
8

9 19. Although EPA had signaled support for a streamlined approach (which the Port had
10 relied on when LDWG was first created), ultimately, the Site was placed on the National
11 Priorities List in 2001 and the remedial investigation and feasibility study process ended up
12 taking 12 years.
13

14 20. In addition, the 2000 Administrative Order on Consent was amended to provide for
15 additional studies, sampling, and analysis to prepare the way for EPA's selected remedy. The
16 Port agreed to continue funding that work, which continues at present, for the sake of moving the
17 LDW remedy process forward without delay.

18 21. Thus, for the last 22 years, the Port has been paying a share equal to that of Boeing for
19 the investigation and planning necessary to perform the LDW cleanup. The total response costs
20 shared by the LDWG parties since 2000 now exceeds \$60 million, and that total continues to
21 grow.
22

23 **Boeing Must Pay Its Fair Share**

24 22. Although the LDWG parties have shared costs to implement the Administrative Order on
25 Consent equally since 2000 ("LDWG Shared Costs"), those parties did not contribute equally to
26

1 the contamination that has necessitated the investigation and planning for an LDW sediment
2 cleanup; far from it. As described above, Boeing is *by far* the LDWG party with the greatest
3 responsibility for LDW contamination.

4 23. By contrast, the Port's role in the LDW has been that of an owner/landlord, not an
5 industrial manufacturer or operator. The Port has leased its facilities to tenants that primarily
6 conduct cargo shipping and storage activities. These operations are far cleaner than those of
7 Boeing, whose intensive manufacturing operations used and regularly spilled large magnitudes
8 of PCBs and other hazardous substances, and released them to the LDW.

9 24. The Port, like many other parties along the Waterway, is a potentially responsible party
10 ("PRP") for the Site primarily because it just happens to own property in the vicinity of Boeing
11 and other polluters that contributed the vast majority of PCBs and other hazardous substances to
12 the LDW. Port facilities, by contrast, have released a *de minimis* (if not *de micromis*) amount of
13 hazardous substances to the LDW.
14

15 25. As such, the Port has essentially been subsidizing Boeing's LDW investigation and
16 cleanup planning costs for nearly the past quarter century. We are now at the point in the
17 cleanup process where EPA expects that LDW PRPs will enter into a new agreement to fund and
18 implement actual construction of EPA's remedy – i.e., the most expensive part of the remedy
19 process. The Port is and has been willing to pay its fair share toward such efforts. It is now time
20 for Boeing to pay its fair share.
21

22 26. Boeing's manufacturing operations along the LDW span over a century, including the
23 decades of World War II and the Cold War. At its heart, the LDW Superfund Site is a military-
24 industrial cleanup site with PCBs as the primary hazardous substance driving the need for its
25
26

COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF - 7

1 costly cleanup. And the party with the greatest role *by far* in the historical military-industrial
2 manufacturing that has resulted in widespread PCB contamination in the Waterway is Boeing.
3 As noted, the scope, intensity, and longevity of Boeing's operations (as well as the PCB releases
4 that came with those operations) far exceed that of any other party, now or in the past, along the
5 LDW.
6

7 27. Boeing has profited for decades in part through inexpensive disposal of its wastes
8 through dumping them in the LDW (i.e., externalizing its waste disposal costs). It is therefore
9 fair and equitable for Boeing to reimburse the Port for the millions of dollars in response costs
10 that the Port has fronted in the last 22 years, which should have been paid by Boeing based on its
11 outsized responsibility for LDW contamination. It is also fair and equitable that this Court
12 should set Boeing's fair share for the substantial remedy costs yet to be incurred.
13

14 28. The Port has made diligent efforts over the past eight years (and the last year in
15 particular), at all levels of its organization, to amicably resolve the parties' relative responsibility
16 for LDW cleanup costs.

17 29. The Port sought a resolution that would be consistent with the "polluter pays" principle at
18 the heart of CERCLA and MTCA, and a resolution that would be equitable for the Port and its
19 taxpayers who work hard and support the Port on numerous initiatives. Those initiatives include
20 restoring fish and wildlife habitat and public access spaces along the LDW, and promoting
21 environmental justice and employment opportunities for communities living along and near the
22 LDW.
23

24 30. Despite the Port's diligent efforts to achieve an amicable and equitable resolution, Boeing
25 thus far has not paid its fair share, i.e., a share reflecting the "polluter pays" principle and the fact
26

1 that Boeing is *by far* the biggest contributor of PCBs and other hazardous substances to the
2 LDW.

3 31. If local taxpayers had to pay extra LDW cleanup costs to fill the gap between what
4 Boeing is *willing* to pay and what Boeing equitably *should* pay, those are dollars that would not
5 be available to support environmental, employment, and environmental justice initiatives such as
6 those described above.

7
8 32. The Port cannot accept an arrangement whereby local taxpayers would be stuck paying
9 tens of millions of dollars *beyond* the fair shares of the Port, as well as the City and County, thus
10 effectively having these local governments pay a substantial portion of Boeing's cleanup bill.
11 Boeing has gleaned billions of dollars in profits over the past several decades partly through
12 externalizing its waste disposal costs by dumping wastes into the Lower Duwamish River. The
13 Port, as a steward of public funds, cannot agree to redirect taxpayers' funds from projects and
14 programs that benefit the public in order to permit Boeing to pay far less than its fair share of
15 LDW cleanup costs.

16
17 33. The Port seeks to recover from Boeing under CERCLA for the necessary costs of
18 response that the Port has incurred in a manner consistent with the National Contingency Plan,
19 40 C.F.R. pt. 300, *et seq.*, and that are the result of releases, threatened releases, and/or disposals
20 of hazardous substances from current and historical facilities owned and/or operated by Boeing
21 along and near the LDW, and from which Boeing has arranged for the disposal of hazardous
22 substances into the LDW.

23
24 34. The Port also seeks to recover from Boeing the remedial action costs, within the meaning
25 of MTCA, incurred by the Port in undertaking remedial actions that are the substantial equivalent
26

1 of actions conducted or supervised by Ecology, and that the Port has incurred as a result of
2 releases, threatened releases, and/or disposals of hazardous substances from current and
3 historical facilities owned and/or operated by Boeing along and near the LDW, and from which
4 Boeing has arranged for the disposal of hazardous substances into the LDW. The Port also seeks
5 to recover from Boeing its reasonable attorneys' fees and expenses incurred in pursuing this civil
6 action, pursuant to Revised Code of Washington section 70A.305.080.

7
8 35. The Port also seeks a declaratory judgment holding Boeing liable for response costs and
9 remedial action costs under CERCLA and MTCA, respectively, to be incurred by the Port in the
10 future.

11 II. JURISDICTION AND VENUE

12 36. This Court has exclusive jurisdiction over this CERCLA action pursuant to section
13 113(b) of CERCLA, 42 U.S.C. § 9613(b).

14 37. The Court has jurisdiction over the Port's request for declaratory relief pursuant to the
15 Declaratory Judgments Act, 28 U.S.C. § 2201, and section 113(g)(2) of CERCLA, 42 U.S.C. §
16 9613(g)(2),.

17 38. The Port's CERCLA and MTCA claims arise from a common nucleus of operative facts
18 and are part of the same case or controversy, further adjudication of the CERCLA and MTCA
19 claims at the same time furthers judicial economy, therefore this Court has jurisdiction over the
20 state law MTCA claims pursuant to 28 U.S.C. § 1367.

21 39. Venue in this Court is proper pursuant to section 113(b) of CERCLA, 42 U.S.C.
22 § 9613(b), because the releases and disposals of hazardous substances alleged herein occurred in
23 this District.
24
25
26

1 Corps has maintained responsibility for the federal navigation channel from 1924 to the present.
2 The Army Corps also issued (and still issues) permits to adjoining landowners that wish to
3 dredge, fill, or construct docks or bulkheads in the Waterway.

4 47. The straightening, widening, and deepening of the Duwamish River progressed upstream
5 until the engineered Waterway reached its present configuration – namely, five river miles in
6 length, from Harbor Island at the downstream extent to Turning Basin Number 3, next to the
7 Boeing Developmental Center, at the upstream extent.
8

9 **The Boeing Company**

10 48. From approximately 1910 to the present, Boeing has owned and/or operated the Boeing
11 LDW Facilities described below in paragraphs 49-59.

12 49. From approximately 1910 through 1970, Boeing owned and operated the facility known
13 as Boeing Plant 1, located at 200 S.W. Michigan Street, Seattle, WA.
14

15 50. From approximately 1936 to the present, Boeing has owned and operated the facility
16 known as Boeing Plant 2, located at 7755 East Marginal Way South, Tukwila, WA.

17 51. From approximately the late 1930s or early 1940s to the present, Boeing has owned
18 and/or operated facilities at North Boeing Field, located at 7700 East Marginal Way South,
19 Seattle, WA.
20

21 52. From approximately the late 1930s or early 1940s through 2009, Boeing operated the
22 facility known as the Electronics Manufacturing Facility, located at 7355 Perimeter Road South,
23 Seattle, WA.

24 53. From approximately 1955 to the present Boeing has owned and operated the facility
25 known as the Military Flight Center, located at 10002 East Marginal Way South, Tukwila, WA.
26

1 54. From approximately 1955 to the present Boeing has owned and operated the facility
2 known as the Boeing Developmental Center, located at 9725 East Marginal Way South, Tukwila,
3 WA.

4 55. From approximately 1955 to the present, Boeing has owned and operated the facility
5 known as Boeing South Park, located at 1420 Trenton Street, Seattle, WA.
6

7 56. From approximately 1956 to the present, Boeing has owned and operated the facility
8 known as the Thompson Property, located at 8811 East Marginal Way South, Tukwila, WA.

9 57. From approximately 1957 through 1970, Boeing operated the facility known as the
10 Missile Production Center, located at and near 4735 East Marginal Way South, Seattle, WA.

11 58. From approximately 1984 to the present, Boeing has owned and operated the facility
12 known as the Isaacson Property, located at 8625 East Marginal Way South, Tukwila, WA.
13

14 59. Boeing has also owned or operated 23 other facilities in the vicinity of the LDW,
15 including an industrial park and warehouses.

16 60. Current and historical operations at the Boeing LDW Facilities include, but are not
17 limited to, aircraft and weapons manufacturing and research.

18 61. Operations at the Boeing LDW Facilities have entailed the use of materials that contained
19 hazardous substances, including but not limited to PCBs, metals, dioxins and furans, PAHs, and
20 phthalates.
21

22 62. During its decades of operations, Boeing has released and disposed of hazardous
23 substances, including but not limited to those referenced in paragraph 61, in the LDW. Those
24 releases and disposals have included, but have not been limited to, PCBs released and/or
25 disposed of from leaking transformers and conveyed from the transformer vault sumps directly
26

1 to the LDW via piping, PCBs leaching from concrete joint caulking and building paints and
2 caulks onto facility surfaces and conveyed therefrom to the LDW via stormwater runoff, and
3 PCBs in hydraulic fluids, cutting or cooling oils or fluids, or other materials that were spilled or
4 leaked to facility surfaces and were conveyed therefrom to the LDW via storm sewers or
5 stormwater sheet flow.
6

7 **The Port of Seattle**

8 63. From the 1960s to the present, the Port has owned properties *adjacent to* the LDW, i.e.,
9 *not* within the former Commercial Waterway District No. 1 of King County (“CWD”) right-of-
10 way. The Port has leased those properties to tenants for a variety of operations including
11 (primarily) cargo storage and shipping. The Port’s role along the LDW from the 1960s to the
12 present has been that of a landlord. And the Port’s leased facilities collectively have been an
13 extremely small source of contaminants released to the LDW relative to the magnitude of PCBs
14 and other contaminants released by Boeing as well as other industrial manufacturers operating
15 along the Waterway.
16

17 64. With respect to the right-of-way, by the late 1950s, the CWD had (decades prior)
18 completed its mission of straightening and otherwise engineering the Waterway, and its only
19 remaining role of any significance was to make sure that there were no physical obstructions
20 (e.g., logs) to navigation in the LDW (although it was the Army Corps, not the CWD, that
21 reviewed and approved proposals from adjacent landowners to dredge or fill or erect any
22 structures within the Waterway).
23

24 65. With few remaining assets, the CWD then attempted to compel LDW-adjacent industrial
25 owners and operators with docks or other structures within the Waterway to enter into leases
26

1 with the CWD. This effort lasted only a few years before it was declared unlawful by the
2 Washington Supreme Court in the 1963 case of *Commercial Waterway District No. 1 of King*
3 *County v. Permanente Cement Co.*, 379 P.2d 178 (Wash. 1963). The Court concluded that the
4 CWD held only very limited rights with respect to the LDW right-of-way, which it considered a
5 public water highway. The Court specifically concluded that the CWD could not sell or lease
6 any portion of the 500-foot-wide right-of-way, and did not have the right to exclude third parties
7 from accessing the right-of-way unless they were interfering with navigation or other rights of
8 the general public.
9

10 66. In the wake of the *Permanente* decision (and in the same year), the Washington
11 Legislature enacted new legislation granting commercial waterway districts the authority to
12 dissolve and transfer their “assets, liabilities and functions” to a local port district with
13 jurisdiction. 1963 Wash. Laws, ch. 97, § 1 (“Commercial Waterway Districts—Acquisition by
14 Port Districts”).
15

16 67. Consistent with the intent of the Legislature, in August 1963, the Port agreed to assume
17 all of the assets, liabilities and functions of the CWD, and the CWD dissolved.

18 68. When the Port acquired the assets of the CWD in 1963, the Port knew, based on the
19 *Permanente* decision, that it could not sell or lease any portion of the LDW right-of-way.
20

21 **The Port Has Incurred Substantial Costs For Which Boeing Is Liable**

22 69. Since 2000, the LDWG parties have collectively incurred approximately \$60 million in
23 LDWG-Shared Costs to implement the Administrative Order on Consent (as amended), and the
24 Port has incurred approximately \$15 million as its share of those costs.
25
26

1 70. In addition to its share of LDWG-Shared Costs, the Port has incurred approximately \$8
2 million of other recoverable costs, e.g., employee, overhead, and outside counsel costs
3 (collectively, “Additional Costs”), that were necessary for implementing the Administrative
4 Order on Consent but that were not covered under LDWG’s interim cost-sharing agreement.
5

6 71. The Port’s Additional Costs as well as its share of past LDWG-Shared Costs were
7 necessary for responding to a release, threatened release, or disposal of hazardous substances and
8 were necessary for implementing the Administrative Order on Consent (as amended), and were
9 incurred in a manner consistent with the National Contingency Plan. The Port’s Additional
10 Costs as well as its share of past LDWG-Shared Costs were incurred for actions that were the
11 substantial equivalent of an Ecology-conducted or Ecology-supervised remedial action. The Port
12 will continue to incur CERCLA response costs and MTCA remedial action costs in the future.
13

14 72. The aggregate magnitude of PCBs and other hazardous substances released or disposed
15 of from Boeing LDW Facilities to the LDW – where magnitude reflects volumes and
16 contaminant concentrations in released materials – is far greater than the aggregate magnitude of
17 the same released or disposed of from Port facilities along the LDW.

18 73. Hazardous substance releases and disposals to the LDW for which Boeing is liable under
19 CERCLA and MTCA have adversely impacted the LDW’s sediments to a far greater degree than
20 any releases or disposals for which the Port may be liable.
21

22 74. Boeing’s releases and disposals of hazardous substances to the LDW are, compared to
23 releases and disposals for which the Port may bear responsibility, far greater drivers of the need
24 for the Site’s remedial investigation, feasibility study, other costs to implement the 2000
25
26

1 Administrative Order on Consent as amended, and future remedial action work to implement
 2 EPA's selected remedy.

3
 4 **FIRST CAUSE OF ACTION**
COST RECOVERY UNDER CERCLA

5 75. Paragraphs 1 through 74 are realleged as if set forth fully herein.

6 76. This is an action for cost recovery under section 107(a) of CERCLA, 42 U.S.C.
 7 § 9607(a). To prevail on a claim for private cost recovery under CERCLA § 107(a), 42 U.S.C.
 8 § 9607(a), a plaintiff must establish that there has been a "release" or "threatened release" of a
 9 "hazardous substance" at or from a "facility," which caused the plaintiff to incur "response
 10 costs" that were "necessary" and "consistent with the national contingency plan," and that the
 11 defendant is within at least one of four classes of "persons" subject to liability under
 12 section 107(a).

13
 14 77. The classes of "persons" subject to liability under CERCLA section 107(a) include, in
 15 pertinent part, "(1) the owner and operator of a vessel or a facility, (2) any person who at the
 16 time of disposal of any hazardous substance owned or operated any facility at which such
 17 hazardous substances were disposed of, [and] (3) any person who by contract, agreement, or
 18 otherwise arranged for disposal or treatment, or arranged with a transporter for transport for
 19 disposal or treatment, of hazardous substances owned or possessed by such person, by any other
 20 party or entity, at any facility or incineration vessel owned or operated by another party or entity
 21 and containing such hazardous substances" 42 U.S.C. § 9607(a)(1)-(3).

22
 23 78. Boeing and the Port are "persons" within the meaning of CERCLA section 101(21), 42
 24 U.S.C. § 9601(21).
 25
 26

1 79. Boeing LDW Facilities and the in-water portion of the LDW Site are “facilities” within
2 the meaning of section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

3 80. Boeing is or was the “owner or operator” of Boeing LDW Facilities within the meaning
4 of section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

5 81. PCBs, dioxins/furans, PAHs, phthalates, arsenic, and other metals are “hazardous
6 substances” within the meaning of section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

7 82. There have been “releases,” threatened “releases,” and “disposals” (including but not
8 limited to those described in paragraphs 9-16 and 62 above) of “hazardous substances”
9 (including but not limited to PCBs, dioxins/furans, PAHs, phthalates, arsenic, and other metals)
10 at or from Boeing LDW Facilities – including facilities where Boeing is the current “owner or
11 operator” and facilities that Boeing owned or operated at the time of such disposals – and those
12 releases and disposals resulted in the Port’s incurrence of “response” costs (described below)
13 within the meaning of sections 101(22), 101(14), 101(25), 101(29), and 107 of CERCLA,
14 42 U.S.C. §§ 9601(22), 9601(14), 9601(25), 9601(29), and 9607.

15 83. A person may qualify as an arranger under CERCLA’s liability framework when the
16 person takes intentional steps to dispose of a hazardous substance. Also, arranger liability
17 premised on a person’s control over the disposal process is well established.

18 84. Boeing has arranged for the disposal of hazardous substances from some or all of Boeing
19 LDW Facilities to the LDW.

20 85. Boeing has owned, exercised control over, and had the obligation to dispose of wastes
21 containing hazardous substances at the Boeing LDW Facilities described above. Those wastes
22 include, but are not limited to, process wastes (from electro-plating operations and other
23
24
25
26

1 manufacturing activities) discharged purposefully into the LDW as well as Boeing Plant 2
2 Salvage Yard waste oils, oil-soaked metal chips and borings (called “turnings”), and oil/machine
3 “milk” from the borings that were allowed to drain/spill to outdoor ground surfaces and from
4 there to a nearby drainage ditch and/or storm drains discharging to the LDW.

5
6 86. Boeing took intentional steps to dispose of wastes containing hazardous substances in the
7 LDW. Those steps include, but are not limited to, the purposeful discharge of industrial process
8 wastes from Boeing Plant 2, Boeing Plant 1, and other facilities directly to the LDW, as well as
9 the deliberate disposals of Boeing Plant 2 Salvage Yard wastes into the LDW via a drainage
10 ditch or storm sewers, as described above in paragraph 85.

11
12 87. The CERCLA response costs incurred by the Port include LDW remedial investigation
13 and feasibility study costs, remedial design costs, and other costs to implement the 2000
14 Administrative Order on Consent (as amended), including Port employee, overhead, and outside
15 counsel costs. These costs include retaining and supervising LDWG common consultants to
16 perform the sediment sampling, analysis, reporting, planning, and agency communications (and
17 numerous other tasks) associated with the work to implement the Administrative Order on
18 Consent (as amended).

19
20 88. The response costs incurred by the Port were reasonable, necessary, and consistent with
21 the National Contingency Plan within the meaning of section 107 of CERCLA, 42 U.S.C.
22 § 9607. Costs incurred to implement an EPA order (such as the Administrative Order on
23 Consent) are presumptively necessary and consistent with the National Contingency Plan.

24
25 89. Apart from this action, the Port is not, and has not been, engaged in a civil action under
26 42 U.S.C. § 9606 or 42 U.S.C. § 9607(a) with respect to the costs at issue in this action.

1 90. Pursuant to the terms of the Administrative Order on Consent, the Port will not resolve its
2 liability to the United States or the State of Washington with respect to costs necessary to
3 implement the Administrative Order on Consent until satisfaction of the requirements of the
4 Administrative Order on Consent, which will not occur until the Port and the other LDWG
5 parties demonstrate, in writing, and certify to the satisfaction of EPA and Ecology, that all
6 activities required under the Administrative Order on Consent have been performed, and EPA
7 and Ecology have approved that certification.

8
9 91. Accordingly, because the Port and the other LDWG parties have not completed the work
10 required under the Administrative Order on Consent (as amended), the Port has not resolved its
11 liability to the United States or the State of Washington within the meaning of 42 U.S.C.
12 § 9613(f)(3)(B) with respect to the costs at issue in this cause of action.

13
14 92. The Port currently does not satisfy the requirements to bring a contribution action under
15 CERCLA section 113(f), 42 U.S.C. § 9613(f), but it does satisfy the requirements for, and may
16 pursue, a cost recovery action under CERCLA section 107(a), 42 U.S.C. § 9607(a).

17 93. Accordingly, based on the foregoing facts and legal principles, and pursuant to CERCLA
18 section 107(a), 42 U.S.C. § 9607(a), the Port is entitled to cost recovery from Boeing for LDW
19 response costs incurred by the Port.

20
21 94. The Port is entitled to pre- and post-judgment interest on the amount recovered under this
22 claim pursuant to CERCLA section 107(a), 42 U.S.C. § 9607(a).

**SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT OF CERCLA LIABILITY FOR RESPONSE COSTS**

95. Paragraphs 1 through 94 are realleged as if set forth fully herein.

96. This is a claim for declaratory judgment under section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), and 28 U.S.C. § 2201. Within the meaning of those statutes, an actual and substantial controversy exists between the Port and Boeing regarding their respective rights and obligations related to the costs that the Port has incurred and will incur to implement the 2000 Administrative Order on Consent (as amended) or otherwise respond to releases or threatened releases to the LDW.

97. The Port will continue to incur CERCLA response costs in the future, including additional costs to implement the Administrative Order on Consent (as amended).

98. Pursuant to 42 U.S.C. § 9613(g)(2) and 28 U.S.C. § 2201, the Port is entitled to a declaratory judgment that Boeing is liable to the Port for the Port's future response costs, together with pre- and post-judgment interest, that are necessary and consistent with the National Contingency Plan for responding to releases, threatened releases, or disposals of hazardous substances to the LDW from any of the Boeing LDW Facilities.

**THIRD CAUSE OF ACTION
RECOVERY OF REMEDIAL ACTION COSTS UNDER MTCA**

99. Paragraphs 1 through 98 are realleged as if set forth fully herein.

100. This is an action for recovery of remedial action costs, including reasonable attorneys' fees and expenses, under MTCA, Wash. Rev. Code Ann. § 70A.305.080. MTCA's liability scheme is substantially similar to CERCLA, outlining categories of potentially liable persons ("PLPs") that are "strictly liable, jointly and severally, for all remedial action costs . . . resulting

1 from the releases or threatened releases of hazardous substances” at or from a facility. *Id.* §
 2 70A.305.040(2). The PLP categories are (in pertinent part for this Complaint): “(a) The owner
 3 or operator of the facility; (b) Any person who owned or operated the facility at the time of
 4 disposal or release of the hazardous substances; [or] (c) Any person who owned or possessed a
 5 hazardous substance and who by contract, agreement, or otherwise arranged for disposal or
 6 treatment of the hazardous substance at the facility, or arranged with a transporter for transport
 7 for disposal or treatment of the hazardous substances at the facility, or otherwise generated
 8 hazardous wastes disposed of or treated at the facility[.]” *Id.* § 70A.305.040(1).

10 101. Unlike CERCLA, there is no intent element required for “arranger” liability under
 11 MTCA.

12 102. Whereas CERCLA liability applies to owners or operators at the time of “disposal” of
 13 hazardous substances, MTCA applies more broadly to owners or operators at the time of
 14 “disposal *or release*” of hazardous substances. *Compare* 42 U.S.C. § 9607(a)(2) *with* Wash.
 15 Rev. Code Ann. § 70A.305.040(1)(b) (emphasis added). Therefore, because “release” is
 16 included as well as “disposal,” constraints on the definition of “disposal” do not bar potential
 17 liability under this MTCA provision in the way they might under its CERCLA equivalent.

18 103. Under MTCA, “remedial action costs” explicitly include “reasonable attorneys’ fees and
 19 expenses.” Wash. Rev. Code Ann. § 70A.305.080. Furthermore, “[t]he prevailing party in [an
 20 action for recovery of remedial action costs under Wash. Rev. Code Ann. § 70A.305.080] shall
 21 recover its reasonable attorneys’ fees and costs.” *Id.*

22 104. Boeing and the Port are “persons” within the meaning of Revised Code of Washington
 23 section 70A.305.020(24).
 24
 25
 26

105. Boeing LDW Facilities and the in-water portion of the LDW Site are “facilities” under Revised Code of Washington section 70A.305.020(8).

106. Boeing is or was the “owner or operator” of Boeing LDW Facilities within the meaning of Revised Code of Washington section 70A.305.020(22).

107. PCBs, dioxins/furans, PAHs, phthalates, arsenic, and other metals are “hazardous substances” within the meaning of Revised Code of Washington section 70A.305.020(13).

108. There have been “releases” and/or threatened “releases” (including but not limited to those described in paragraphs 9-16 and 62 above) of “hazardous substances” (including but not limited to PCBs, dioxins/furans, PAHs, phthalates, arsenic, and other metals) at or from Boeing LDW Facilities – including facilities where Boeing is the current “owner or operator” and facilities that Boeing owned or operated at the time of the releases – and those releases resulted in the Port’s incurrence of remedial action costs (described below) within the meaning of Revised Code of Washington sections 70A.305.020(8), -(13), -(22), -(24), and -(32); 70A.305.040; and 70A.305.080.

109. In addition, based on the foregoing facts (including those asserted in paragraphs 85-86 above) and applicable law, Boeing arranged for the disposal of hazardous substances, within the meaning of Revised Code of Washington section 70A.305.040, from some or all of the Boeing LDW Facilities to the LDW.

110. The MTCA remedial action costs incurred by the Port included LDW remedial investigation and feasibility study costs, remedial design costs, and other costs to implement the Administrative Order on Consent (as amended), including Port employee, overhead, and outside counsel costs. These costs include retaining and supervising LDWG common consultants to

1 perform the sediment sampling, analysis, reporting, planning, and agency communications (and
2 numerous other tasks) associated with the work to implement the Administrative Order on
3 Consent (as amended).

4 111. The remedial action costs incurred by the Port were the substantial equivalent of an
5 Ecology-conducted or Ecology-supervised remedial action, within the meaning of Revised Code
6 of Washington section 70A.305.080.

7
8 112. Accordingly, pursuant to Revised Code of Washington section 70A.305.040 and
9 70A.305.080, the Port is entitled to contribution relief for the recovery of remedial action costs
10 from Boeing based on such equitable factors as this Court determines are appropriate. Such
11 remedial action costs include the Port's reasonable attorneys' fees and expenses, including those
12 incurred and to be incurred in pursuing the case at bar as well as reasonable attorneys' fees and
13 expenses incurred since approximately 2000 pertaining to the Port's involvement in studying the
14 nature and extent of LDW Site sediment contamination and planning for its remediation.
15

16 **FOURTH CAUSE OF ACTION**
17 **DECLARATORY JUDGMENT UNDER MTCA**

18 113. Paragraphs 1 through 112 are realleged as if set forth fully herein.

19 114. Based on the foregoing facts and applicable law, the Port is also entitled, pursuant to
20 Revised Code of Washington sections 70A.305.040 and 70A.305.080, to a declaratory judgment
21 that Boeing is liable to the Port for the Port's future-incurred remedial action costs (including
22 reasonable attorneys' fees and expenses), together with pre- and post-judgment interest, that are
23 incurred for remedial actions that are the substantial equivalent of an Ecology-conducted or
24 Ecology-supervised remedial action within the meaning of Revised Code of Washington section
25 70A.305.080.
26

PRAYER FOR RELIEF

WHEREFORE, the Port respectfully requests the Court enter judgment in its favor and against Boeing on the causes of action of this Complaint as follows:

1. On its First Cause of Action, judgment in favor of the Port and against Boeing for the Port's past necessary response costs that are consistent with the National Contingency Plan and incurred as a result of releases and disposals of hazardous substances from Boeing LDW Facilities to the LDW, in an amount to be proven at trial;

2. On its Second Cause of Action, judgment declaring that Boeing is liable for the Port's future necessary costs that are consistent with the National Contingency Plan and that the Port will incur as a result of releases and disposals of hazardous substances from Boeing LDW Facilities to the LDW;

3. On its Third Cause of Action, judgment in favor of the Port and against Boeing for the Port's past remedial action costs (including reasonable attorneys' fees and expenses) incurred as a result of releases of hazardous substances from Boeing LDW Facilities to the LDW, for remedial actions that were the substantial equivalent of an Ecology-conducted or Ecology-supervised remedial action within the meaning of Revised Code of Washington section 70A.305.080, in an amount to be proven at trial, and judgment in favor of the Port and against Boeing for the Port's reasonable attorneys' fees and expenses incurred in pursuing the case at bar, pursuant to Revised Code of Washington section 70A.305.080;

4. On its Fourth Cause of Action, a declaratory judgment that Boeing is liable to the Port for the Port's future remedial action costs (including reasonable attorneys' fees and expenses) that are incurred for remedial actions that are the substantial equivalent of an Ecology-

1 conducted or Ecology-supervised remedial action within the meaning of Revised Code of
2 Washington section 70A.305.080.

3 5. As to all claims for relief, judgment for pre- and post-judgment interest on
4 response costs and/or remedial action costs incurred or to be incurred by the Port; and
5

6 6. As to all claims for relief, judgment for all costs and expenses incurred in this
7 action, to the extent provided for by law, and such other and further relief as this Court may
8 deem just and proper.

9 DATED this 19th day of July, 2022.

10 STOEL RIVES LLP

11 /s/Maren R. Norton

12 Maren R. Norton, WSBA No. 35435
13 maren.norton@stoel.com

14 /s/James T. Graves

15 James T. Graves, WSBA No. 48033
james.graves@stoel.com

16 Stoel Rives LLP
17 600 University St., Ste. 3600
Seattle, WA 98101
Tel.: (206) 624-0900

18 *Attorneys for Plaintiff Port of Seattle*
19
20
21
22
23
24
25
26